IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Appellants,

v.

THE STATE OF MICHIGAN,

Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, and GAMING ENTERTAINMENT, LLC,

Intervening Appellees.
_____/

Supreme Court No. 122830

Court of Appeals No. 225017

Ingham County Cir. Ct. No. 99-90195-CZ

TOMAC'S REPLY BRIEF

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INTRODUCTION

Despite more than 250 pages of *amicus* and appellee briefing, one dispositive point remains unrebutted: *before* the Michigan legislature "approved" the gambling compacts, it was illegal for a Michigan resident to play slot machines on Indian lands in Calhoun county; after "approval," such conduct is legal. Action by the legislature that changes law is legislation by any definition and constitutionally must be approved by bill.

Both the majority and dissent in *Blank* v *Department of Corrections*, 462 Mich 103; 611 NW2d 530 (2000), recognized that legislative action exerting a "policy-making effect *equivalent to amending or repealing existing legislation*" is "subject to the enactment and presentment requirements of our 1963 Constitution." *Blank*, 462 Mich at 117 n8 (Kelly, J., joined by Young, J., and Corrigan, J., concurred with by Weaver, C.J.) (emphasis added) (citation omitted), 176 n11 (Cavanagh, J., concluding legislative veto was not legislation because its exercise "holds the status quo ante in place" instead of "amending or repealing existing legislation"). The compacts effectively change gambling laws that apply to specific Indian lands—a result that could otherwise be accomplished only by amending Michigan statutes made applicable to these lands by 18 USC 1166. In place of existing laws, the compacts create new rules that implement different policy decisions. Accordingly, the legislature's approval of the compacts by joint resolution rather than by bill is unconstitutional.

ARGUMENT

I. The compacts are subject to the Michigan constitution's enactment and presentment requirements because they are legislation.

A. The compacts effectively change state law that 18 USC 1166 makes applicable to Indian lands in the absence of a compact.

Appellees seek to minimize the impact of 18 USC 1166 by arguing that it does not grant the state enforcement jurisdiction on Indian lands. But this is beside the point because

under §1166, Michigan—not the federal government—determines whether and how gambling will take place on Indian lands in the absence of a compact. As recently discussed by the Ninth Circuit Court of Appeals:

> One of the bases of the holding in *Cabazon* was that Congress had not explicitly ceded regulatory authority for gaming to the states . . . . IGRA responded by creating a statutory basis for gaming regulation that introduced the compacting process as a means of sharing with the states the federal government's regulatory authority over class III gaming. Simultaneously, IGRA put into effect 18 U.S.C. § 1166, which provides that 'all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.' 18 U.S.C. §1166(a). The federal government retained the power to prosecute violations of state gambling laws in Indian country, so as to preserve the delicate balance of power between the States and the tribes. *However, the fact that the government retained that power does not change the fact that California may enact laws and regulations concerning gambling that have an effect on Indian lands via §1166.*

Artichoke Joe's California Grand Casino v *Norton*, __ F3d __; 2003 US App LEXIS 25893, *25-*26 (CA 9, 2003) (emphasis added) (internal citations omitted).

B. Appellee's proposed test—whether the legislature can act "without any specified limitation"—ignores *Blank* and is unworkable.

In *Blank*, this Court directly addressed when conduct is "legislative," thus requiring enactment by bill. Whether an act is "legislative" does not depend on its form (e.g., whether it is a compact or contract), but on its effect. *See Blank*, 462 Mich at 115-117 (examining effect of legislative veto to determine it was legislative action); *see also Immigration and Naturalization Service* v *Chadha*, 462 US 919, 952; 103 S Ct 2764; 77 L Ed 2d 317 (1983) (looking at legislative action to determine its effect). Focusing on the effect prevents the legislature from doing an end run around the constitution's enactment and presentment requirements simply by labeling its actions as something other than legislation. Because the compacts have the effect of changing gambling laws that affect Michigan residents and impose

new obligations on specific local communities, the constitution requires approval by bill. *See* Const 1963, art 4, § 22.

Appellees attempt to sidestep *Blank* and contend, instead, that the hallmark of legislation is the legislature's ability to act unilaterally, i.e. "without any specified limitation." *See* State's Br at 12-13, Gaming Entertainment's Br at 21-22. In *Westervelt* v *Natural Resources Comm*, 402 Mich 412, 440; 263 NW2d 564 (1978), this may have been a useful way for Justice Williams to distinguish between the narrowly circumscribed authority given to an administrative agency and the broader power vested in the legislature, but as a "test" for identifying "legislative" action by the legislature, it necessarily fails because no legislature has a truly unrestricted ability to legislate. Indeed, both the Federal and State constitutions impose limitations on the legislature's power. *See, e.g.,* Const 1963, art 1, § 5 (prohibiting laws restricting right of free speech and the press), Const 1963, art 4, § 46 (prohibiting criminal laws that call for the death penalty), Const 1963, art 9, § 8 (prohibiting a sales tax on prescription drugs or food). Yet when the legislature acts within permitted bounds, the result is still "legislation."

Appellees are also wrong in their contention that an act subject to approval by those affected cannot be legislation. To the contrary, Michigan's constitution expressly provides for situations in which individuals and communities decide whether a bill passed by the legislature will take effect. For example, every bill must be submitted for approval or veto by the governor. Const 1963, art 4, § 33. Certain laws dealing with state tax or spending must be approved by state voters. Const 1963, art 9, § 25. And any local act (an issue in this very case) must be approved by the community affected by the act. Const 1963, art 4, § 29. Federal law, too, imposes restrictions on states and sometimes requires federal approval of state laws before

the laws become effective. *See, e.g.*, 42 USC 6926 (requiring federal authorization of state hazardous waste laws). The need for additional approval does not strip the original action of its legislative character. Rather, such approval is an *additional* requirement to make the legislative act effective.

In short, the need for tribal approval of a compact's provisions does not alter the original character of the Michigan legislature's action.[1] As this Court recognized in *Blank*, the controlling issue is the impact, not the form, of the legislature's actions. When the action effectively changes the law, as it does here, it must comply with the constitutional requirements that apply to legislation.[2]

C. Appellee's delegation cases are irrelevant to the question of what constitutes legislation.

Appellees cite to *Boerth* v *Detroit City Gas Co*, 152 Mich 654; 116 NW 628 (1908), and its related municipal rate-making cases to argue that the compacts were not subject to constitutional enactment and presentment requirements. None of these cases, however, deal with action by the State legislature. Nor do any of these cases involve the critical constitutional

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[1]As TOMAC demonstrated in its Brief on Appeal, Michigan has historically treated compacts as legislation even though they are always subject to consent. Appellants' Br at 10-12. Appellees argue that this long history results merely from "caution and convenience" on the part of the legislature. State Br at 33-34. A more reasonable explanation is that the state legislature has recognized that compacts implement state law and policy, requiring approval by bill. The State's argument that the method for approving a compact "is dictated by the terms of the compact" is similarly misguided. State's Br at 23 (citing *Sullivan* v *Commonwealth,* 550 Pa 639; 708 A2d 481 (1998)). *Sullivan* involved a compact whose terms required adoption by statute, and the *Sullivan* court does not imply it would have endorsed approval by resolution if the compact had so stated. To the contrary, the court actually questioned whether even an enabling act (much less a resolution) could ever be sufficient, citing the restriction in the Pennsylvania Constitution that "no law shall be passed except by bill . . . ." *Sullivan,* 550 Pa at 647-648.

[2] Because the compacts are legislative in character, the constitution requires that any change, alteration or amendment "shall be re-enacted." 1963 Const, at 4 § 25. Thus, those provisions that allow the Governor to amend the compacts without re-enactment, Compacts at § 16 (App 64a-65a), are facially invalid.

requirement at issue here, namely that "All legislation shall be by bill . . . ." Const 1963, art 4 § 22.

Instead, *Boerth* and its related cases deal with authority *delegated* to municipalities. *See, e.g., Boerth*, 152 Mich 654 (finding that statutory authority granted to city included right to set rates in contracts). The rulings actually emphasize the importance of an underlying statute or constitutional provision granting the municipalities the authority to set rates by contract. *See, e.g., City of Kalamazoo* v *Kalamazoo Circuit Judge*, 200 Mich 146, 157; 166 NW 998 (1918) (finding that constitution granted the city the right to set rates in contracts), *City of Indianapolis* v *Gas-Light & Coke Co*, 66 Ind 396, 403; 1897 WL 5803 (1897) (ruling that city's contract was within scope of statutory authority granted city).[3] Even more fundamentally, the municipalities involved in these cases are not subject to the enactment and presentment requirements of the constitution. *See generally,* Const 1963, art 4. Thus, there was no need for these courts to consider whether the municipalities also had to meet these requirements. The legislature, in contrast, *is* subject to the enactment and presentment requirements.

D. The compacts impose obligations on local communities.

The compacts expressly require, using mandatory terms, that each affected community create a Local Revenue Sharing Board to disburse the local share of casino revenue. Appellees ignore the plain language of the compacts and claim the mandatory requirement is actually nothing but a "condition precedent" for local communities to voluntarily receive such

[3] *Confederated Tribes of the Chehalis Reservation* v *Johnson,* 135 Wash 2d 734, 750; 958 P2d 260 (1998) is similarly a delegation case. There, the State of Washington enacted an enabling act to empower a commission to enter into compacts. *See* Wash Rev Code 9.46.360(9). In such a case, the enabling act serves as the "legislation." Here, by contrast, the legislature failed to enact enabling legislation.

payments as third-party beneficiaries of the compacts. This *post hoc* rationalization completely ignores the plain text of the compacts.

The compacts state that a tribe "*will make* semi-annual payments to the treasurer" of the local communities "to be held by said treasurer for and on behalf of the Local Revenue Sharing Board," and that "a Local Revenue Sharing Board *shall be* created" by those local governments "to receive and disburse the semi-annual payments from the Tribe." Compacts at § 18(A) (emphasis added) (App at 66a-67a). There is no provision that conditions tribal payments on the creation of a Local Revenue Sharing Board, no provision indicating that Local Revenue Sharing Boards are at the discretion of local governments, and no procedure for the Tribe to follow if a community fails to create a Local Revenue Sharing Board.

Giving all clauses in the compact their effective and reasonable meaning leads to only one conclusion: the legislature requires tribes to pay money to locally affected communities and requires locally affected communities to create Local Revenue Sharing Boards. By mandating creation of a new governmental board in four specified local communities, the compacts again reveal their legislative nature.

E. *Amici's* reliance on the procedures for ratifying Constitutional amendments is misplaced.

Amici argue that the procedure by which a state ratifies an amendment to the U.S. Constitution should also apply to the manner in which a state consents to a tribal gambling compact. However, the manner in which a state ratifies such a constitutional amendment is governed by federal law. *See Hawke* v *Smith*, 253 US 221, 230; 40 S Ct 495; 64 L Ed 871 (1920) ("The act of ratification by the States derives its authority from the Federal Constitution to which the State and its people have alike assented"); *accord Leser* v *Garnett*, 258 US 130, 137; 42 S Ct 217; 66 L Ed 505 (1922); *Decher* v *Secretary of State*, 209 Mich 565; 177 NW 388

(1920) (interpreting U.S. Constitution to determine how the Michigan legislature ratifies federal constitutional amendments). The U.S. Constitution does not govern how a state approves a compact under IGRA. To the contrary, compact approval is a matter of state law. *See Pueblo of Santa Anna* v *Kelly*, 104 F3d 1546, 1557-1558 (CA 10, 1997). In Michigan, *Blank* governs the question of whether such approval must be in the form of legislation.

II. By specifically targeting four communities, the compacts are local acts.

Because the compacts by their express terms carve out four specifically named Michigan locales as the exclusive host communities for the casinos, the compacts are paradigmatic local acts that require approval by a super-majority of both houses of the legislature and a majority of electors within the specifically designated communities. *See* Const 1963, art 4, § 29. This is the message of *Michigan* v *Wayne Co Clerk*, 466 Mich 640; 648 NW2d 202 (2002) (invalidating legislation that could only apply to Detroit) and *Huron-Clinton Metro Authority* v *Board of Supervisors*, 300 Mich 1; 1 NW2d 430 (1942). *See generally*, Appellants Br at 45-49. Despite over 250 pages of Appellee response briefing, neither the State, the Interveners nor their *amici* cite or discuss either of these cases.

Instead, Appellees argue that there can be no local act as long as the topic of legislative action involves an issue of state-wide concern. But such a test would, as a practical matter, read the local act provision out of the constitution because the legislature's decision to address a topic naturally makes it an issue of state concern. Moreover, a careful review of the cases cited by Appellees demonstrates that each of them involved generically worded legislation that peculiarly affected certain regions of the state by dint of circumstance, and not because of territorially limited statutory text. See *Hart* v *Wayne Co*, 396 Mich 259; 240 NW2d 697 (1976) (discussing provisions of the Municipal Courts of Record Act, 1919 PA 369, applicable by its

terms to any municipal court of record existing in the State), *WA Foote Memorial Hospital, Inc* v *Kelley*, 390 Mich 193; 211 NW2d 649 (1973) (discussing state-wide Hospital Finance Authority), *Ecorse* v *Peoples Community Hospital Authority*, 336 Mich 490; 58 NW2d 159 (1953) (discussing act permitting any two municipalities in the state to form a combined hospital authority), *Eaves* v *State Bridge Comm*, 277 Mich 373; 269 NW2d 388 (1936) (discussing 1935 Public Act 147, MCL 254.151-167, which created a State Bridge Commission empowered to act throughout the State), and *MacQueen* v *City Comm of Port Huron*, 194 Mich 328; 160 NW 627 (1916) (discussing act granting school districts of a certain size the power to borrow money and issue bonds).

None of Appellees' cases involve legislative actions, such as the compacts, expressly limited by their terms to specified communities within the State. Further, while some of Appellees' cases involve the creation of state agencies or bodies in certain locales, *see, e.g.*, *WA Foote Memorial Hospital*, 390 Mich at 203, *Ecorse*, 336 Mich at 502, *MacQueen*, 194 Mich at 338, none of those cases involve the creation of local agencies or bodies. Here, the compacts require the four specifically named host communities to establish Local Revenue Sharing Boards to deal with the unquestionable impact of casinos on those specific communities. The compacts are therefore local acts.

III. A decision by this court invalidating the compacts should apply to the compacts at issue.

The *amici* tribes argue that a ruling by this court invalidating the compacts should have prospective impact only. But this Court should not be swayed by the tribes' claim of unfair

prejudice.[4] To the contrary, the tribes had ample notice of the constitutional infirmity at issue here.

Even before the compacts were finalized in 1998, the Attorney General stated in a published opinion that a bill would be required for their approval. *See* OAG, 1997, No 6,960 (October 21, 1997). Nevertheless, proponents of the compacts pushed them through to "approval" by resolution. The validity of the compacts was promptly challenged in federal court (*Baird* v *Babbit*, United States District Court Case No 5:99-CV-14 (WD Mich 1999) (App at 79a) (filed January 27, 1999)), followed soon by this case.[5]

Rather than wait for the legal issues to be resolved, two tribes and their casino-backers rushed forward. The Little River Band of Ottawa Indians broke ground, began casino operations, and actually expanded, all in 1999. *See Little River Casino Expansion Opens*, South Bend Tribune, December 21, 1999. The Little Traverse Bay Bands of Odawa Indians opened its casino in July of that same year, was shut down by the federal courts for failing to follow legal requirements under IGRA, and then re-opened just after the Circuit Court in this case declared the compacts invalid in January of 2000.[6] Indeed, in the face of the Circuit Court opinion invalidating the compacts, the Little River Band of Ottawa Indians carried out a $77 million expansion! *See* Vanessa McCray, *Convention Center Opens in Manistee,* Traverse City Record Eagle, August 20, 2002.

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[4] While the *amici* are also concerned about the impact of a ruling on the 1993 compacts, those compacts are not at issue in this case. Moreover, as pointed out by *amicus curiae* Sault Ste. Marie Tribe of Chippewa Indians, different factual and equitable circumstances surrounding the 1993 compacts may lead to a different result.

[5] This suit was filed on June 9, 1999, about one month after the decision in *Baird.*

[6] *See Bay Mills Indian Community* v *Little Traverse Bay Bands of Odawa Indians,* 1999 US Dist LEXIS 20314 (WD Mich, 1999). The court noted that the tribe could not complain of harm where it had taken a "calculated risk" to open even though it was on notice that it had not met legal requirements. *Id.* at *14-*15. *See also* John Flesher, *Anti-Gambling Group Tries to Shut Down Local Casinos,* Traverse City Record Eagle, January 20, 2000.

As the facts demonstrate, the tribes were on notice from the very start that the compacts may be invalid, but took knowing and calculated risks in the face of the uncertainty. They cannot complain if their bet does not pay off.

CONCLUSION

For the reasons set forth above and its Brief on Appeal, TOMAC asks this Court to declare that the compacts are invalid until they are approved by legislative enactment consistent with all applicable provisions of the Michigan constitution.

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Dated: January 23, 2004

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